

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL SPOONER AND DEBRA SPOONER,

UNPUBLISHED

Plaintiff-Appellants,

v

No. 175965

St. Clair Circuit

LC No. 93-000940 CC

PAUL LEIDER, ST. CLAIR COUNTY DRAIN
COMMISSION AND THOMAS DONAHUE, ST.
CLAIR COUNTY DRAIN COMMISSIONER,

Defendant-Appellees.

Before: Young, P.J., and Holbrook, and J.R. Ernst,* JJ.

ERNST, J. (concurring in part and dissenting in part).

I respectfully dissent from that part of the majority opinion which concludes that defendant Thomas Donahue, St. Clair County Drain Commissioner, has no liability for flooding of plaintiffs' land caused by overflow from a drain under the jurisdiction of said defendant.

The majority finds that defendant Drain Commissioner lacks the ability to establish a sufficient outlet for Graham Drain within St. Clair County and that he is without statutory authority to provide such outlet by extension of said drain into neighboring Macomb County. Because defendant appears unable to abate the nuisance, the majority concludes that plaintiffs "cannot establish that he has the requisite control over the nuisance to succeed in their claim of trespass nuisance."

I submit that an inability to restore the genie into the bottle is no defense against liability for damages caused by its intentional release. Here, Graham Drain is a public drain under the jurisdiction of defendant. Therefore, defendant by law does have control over the property from which the nuisance arose.

Plaintiffs allege that waters collecting in said drain seasonally rise due to an inadequate outlet, overflowing unto plaintiffs' property. The Supreme Court found that identical facts in *Hadfield* represent "a clear example of an actionable trespass-nuisance" * * * "for which the county drain

* Circuit judge, sitting on the Court of Appeals by assignment.

commissioner may be held liable.” *Hadfield, supra*, p 184. “Since the duty of a municipal corporation in respect to sewers and drains constructed by it is not performed until it has given them an outlet, it will be liable for damages caused by the insufficient capacity of an outlet to permit the escape of such water as may reasonably be expected to come to it.” 18A McQuillin, Municipal Corporations, 3rd Edition Revised, §53.123 p 228 (footnotes omitted).

Notwithstanding defendant’s asserted inability to abate the condition causing plaintiffs’ injury by improvement to the drain outlet, he does remain capable of responding to a claim for monetary damages for injury to plaintiffs’ property caused by waters overflowing from Graham Drain, a public drain under his control.

I would reverse and remand for trial on this issue.

/s/ J. Richard Ernst